

BEFORE THE
COPYRIGHT ARBITRATION ROYALTY PANEL

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OF COPYRIGHT

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DISTRIBUTION OF 1990, 1991 AND 1992 CABLE ROYALTY FUNDS

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Docket No.
94-3-CARP-CD90-92

Thursday, July 11, 1996

Hearing Room 414, Fourth Floor
Madison Building
Library of Congress
101 Independence Avenue, S.E.
Washington D.C.

The above-entitled matter came on for a meeting,
at 11:00 a.m.

BEFORE:

MARYBETH PETERS, Register of Copyrights

WILLIAM ROBERTS, Senior Attorney, CARP

ROBERT CASSLER, Policy Planning Advisor

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APPEARANCES:On Behalf of Joint Sports Claimants:Major League Baseball

ROBERT ALAN GARRETT, ESQ.,
DAVID D. GERSCH, ESQ., and
PETER G. NEIMAN, ESQ.
KATHLEEN BEHAN, ESQ
of: Arnold & Porter
555 12th Street, N.W.
Washington D.C. 20004-1202
(202) 942-5444

National Basketball Association and
National Hockey League

PHILIP R. HOCHBERG, ESQ.
of: Baraff, Koerner, Olender & Hochberg, P.C.
Suite 640
Three Bethesda Metro Center
Bethesda, Maryland 20814-5330
(301) 686-3200

National Collegiate Athletic Association

JUDITH JUIN SEMO, ESQ.
of: Squire, Sanders & Dempsey
Suite 400
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 626-6606

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WASHINGTON, D.C. 20005-3701

On Behalf of Devotional Claimants:

CLIFFORD M. HARRINGTON, ESQ.
BARRY H. GOTTFRIED, ESQ.
HEIDI ATASSI GAFFNEY, ESQ.
of: Fisher, Wayland, Cooper, Leader
& Zaragoza, L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 420
Washington D.C. 20006-1851
(202) 775-3539

On Behalf of Devotional Claimants:(cont.)

RICHARD M. CAMPANELLI, ESQ.
GEORGE R. GRANGE, II, ESQ.
JANE ALLISON AUSTIN, ESQ.
of: Gammon & Grange, P.C.
Seventh Floor
8280 Greensboro Drive
McLean, Virginia 22102-3807
(703) 761-5000

JOHN H. MIDLEN, JR.
Chartered
3238 Prospect Street, N.W.
Washington D.C. 20007-3214
(202) 333-1500

On Behalf of the National Association
of Broadcasters Claimants:

BENJAMIN F.P. IVINS, ESQ.
MELISSA BLEVINS, ESQ.
of: National Association of Broadcasters
1771 N Street, N.W.
Washington D.C. 20036
(202) 429-5460

AND

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WASHINGTON, D.C. 20005-3701

APPEARANCES: (cont.)

JACQUELINE E. HAND, ESQ.
JOHN J. STEWART, ESQ.
of: Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington D.C. 20004-2595
(202) 624-2793

On Behalf of the Canadian Claimants:

VICTOR J. COSENTINO, ESQ.
L. KENDALL SATTERFIELD, ESQ.
of: Finkelstein, Thompson & Loughran
2828 Pennsylvania Avenue, N.W.
Washington D.C. 20007
(202) 337-8000

AND

ERICA E. REDLER, ESQ.
Senior Legal Counsel
Canadian Broadcasting Corporation
(613) 783-6838

On Behalf of the PublicBroadcasting Corporation Claimants:

GARY D. POON, ESQ.
Assistant General Counsel
1320 Braddock Place
Alexandria, VA 22314
(703) 739-7532

MICHELE J. WOODS, ESQ.
TIMOTHY C. HESTER, ESQ.
of: Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington D.C. 20044
(202) 662-5324

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APPEARANCES: (cont.)On Behalf of the Program Suppliers Claimants:Motion Picture Association of America:

DENNIS LANE, ESQ.

JOHN M. COLLINS, ESQ.

LYNN PREHEIM, ESQ.

JOHN E. McCaffrey, ESQ.

of: Morrison & Hecker, L.L.P.

1150 18th Street, N.W.

Suite 800

Washington D.C. 20036-3816

(202) 785-9100

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P-R-O-C-E-E-D-I-N-G-S .

(11:08 a.m.)

MS. PETERS: First of all, I want to start by saying thank you all for coming. My name is Marybeth Peters. I'm the Register of Copyrights and I have on my left a few friends. On my left is William Roberts who is Senior Attorney specializing in the CARP program and the licensing activities of the Copyright Office. On my right is Bob Cassler, who has been with us basically on various assignments for the last, at least three years, and who has worked very heavily on the proceedings that were before the Copyright Arbitration Royalty Panel for the cable distribution.

I'm sure all of you are aware that we did receive the report of the Arbitrators early in June and as you have -- we have reviewed it very, very carefully.

Our job in reviewing it was to decide whether or not the report, as written, was arbitrary or contrary to any of the provisions of law and we have done our review. You certainly have done your

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1 review and we received five petitions from five of the
2 six parties, pointing out where those parties felt
3 that there were errors in the reasoning or where the
4 arbitrary standard had been met so that the decision
5 could not be accepted by the Register and proposed to
6 the Librarian.

7 We also had six replies on those, all six
8 replied. We're here to talk about where do we go from
9 here.

10 I think I find myself and the people in
11 the Copyright Office in a very difficult position. It
12 is clear from our review and from the petitions that
13 we got from you that there are some serious
14 deficiencies in the report that was received. And the
15 way the statute works is from the date that we
16 received it, of course, we have 60 days where if we
17 don't accept the findings, we are to substitute our
18 findings.

19 Unfortunately, when you think about that
20 that is not very realistic to substitute our findings
21 in 60 days. Second, you really can't substitute
22 because in at least one area the decision that was

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1 made excluded evidence that you really need in order
2 to move forward. Third, many of the adjustments have
3 a cascading effect, so when you make an adjustment for
4 accepting argument at one part, it affects all of the
5 rest.

6 So we have been thinking about what do you
7 do, when we -- the Agency is faced with a statute that
8 says what it says and how do you do your job to the
9 best of your ability?

10 We thought of many different things that
11 we might do and could do and we consulted with
12 officials at the Justice Department and we also
13 consulted with our congressional committees to talk
14 about the predicament that we found ourselves in. So
15 we're here to tell you what we're recommending, having
16 heard a lot of input from a number of people who are
17 ultimately responsible for what the law should look
18 like.

19 What everybody has told us is that we
20 cannot just simply let the decision go. Obviously, we
21 cannot accept it. We also, it's really clear, cannot
22 substitute our judgment at this point in time. What

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1 we are proposing to do is to basically take what you
2 have given and what we have and where we find that
3 there are deficiencies and do a remand and the
4 question is to whom.

5 Obviously, one of the questions is do you
6 have authority to do a remand? It says accept or
7 reject. And that's what we've been focusing on in the
8 last week and a half. And having discussed this with
9 the Justice Department and congressional committees,
10 who have pointed out that the Court of Appeal would
11 have to remand in any case, that we should at this
12 point do the remand and the question is remand to whom
13 and what kinds of questions would go back.

14 So I guess at this point we're talking
15 about actually proposing a remand. The question is do
16 you go back to the original panel and the question
17 also is what do you remand and what is the timing of
18 the remand and the billing for the remand.

19 So that's what we've got you here for.
20 I'm going to ask Bill Roberts if he would like to say
21 anything more at this point before we go on?

22 MR. ROBERTS: Okay, good morning everyone.

1 Nice to have you here this morning. It's my
2 understanding that there was a bit of, I guess,
3 perhaps shock from our letter that you received last
4 week saying that we were most likely going to proceed
5 with a remand in this particular case.

6 Marybeth has outlined the reasons for our
7 decision and I guess at this point it would be fair to
8 ask, unless Bob has some further comments, to open up
9 the floor for a discussion as to, I think, the
10 principle issue is right now, is who is going to
11 conduct the remand. I have spoken with Mel Jiganti a
12 couple of times in the last week or so. He has
13 informed me that he would be available to do further
14 work on the report, beginning about the second week of
15 August. We have not spoken to either Mr. Farmakides
16 or to Mr. Wertheim to know what their availability is
17 and/or are they willing to put further time into this
18 report.

19 So that does raise the possibility that
20 there may be -- could be that Mr. Farmakides or Mr.
21 Wertheim may not either be interested in continuing
22 further work or may not be able to, so we may have to

1 nominate a replacement.

2 We do believe that it has to be sent back
3 to three Arbitrators and not to just one Arbitrator or
4 to the Chairperson in this circumstance.

5 So we wanted to hear from you as to
6 whether you felt it was appropriate that it goes back
7 to the three Judges and or perhaps you may feel that
8 you want new Arbitrators for this remand or a mixture.

9 So who would like to start?

10 MS. PETERS: Nobody would like to start.

11 MR. ROBERTS: Nobody would like to start.

12 Well, then I guess I'll have to start calling names
13 would be the way to do it.

14 (Laughter.)

15 MS. PETERS: We really do think that it is
16 your choice. We had talked among ourselves, but
17 you're the parties. You're the ones who have raised
18 most of the questions and it's your royalty pool.

19 MR. IVINS: Can you give us the sense of
20 what kinds or types of categories of issues? You said
21 you had specific ones in mind.

22 MS. PETERS: Well, that was also one of

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1 the questions that we had.. We had been thinking that
2 you would do a specific remand based on the questions
3 that had been raised in your petitions and questions
4 we might identify as opposed to a general remand and
5 so we will also be seeking input on that.

6 We have all seen --

7 MR. IVINS: We've stated ours, but I guess
8 I'd be curious to hear what you had in mind.

9 MR. ROBERTS: We've identified about half
10 a dozen issues that we feel are arbitrary on their
11 face, that the panel, the majority opinion decision is
12 arbitrary. At least one of those and possibly a
13 second issue would require some further taking of
14 evidence, so there would be a need for at least a few
15 more hearing dates.

16 MR. STEWART: May I ask a further question
17 along those lines? Is it your view that the record
18 citations, first of all, is it your view that these
19 half dozen issues were raised by parties in the
20 petitions or are these issues over and above those?

21 MR. ROBERTS: Well, with the exception of
22 one issue they were raised by the parties and Bob,

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1 maybe you might like to speak to that one issue?

2 MR. CASSLER: Well, in our review of the
3 report, there is one issue that struck us that none of
4 the parties raised and that was their decision to give
5 a unified award instead of an award for each of the
6 three years.

7 It was stated in their document without
8 justification, without explanation and we asked Mr.
9 Jiganti about that. He referred us to a part of the
10 transcript where he said that the parties had
11 discussed it and had given him an okay and I went to
12 that part of the transcript and that was not a correct
13 recollection, so that is an issue that is a problem
14 for us.

15 MR. STEWART: Secondly, with respect to
16 the other issues that were raised in the petitions, is
17 it the case that in your view the record citations
18 that were provided by the parties in the petitions are
19 insufficient for you to resolve this issue?

20 MR. ROBERTS: For most of them, no.

21 MR. CASSLER: Well, actually --

22 MR. ROBERTS: In terms of -- you're

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1 talking about citing to the record and asking if can
2 the Librarian conduct its own balance? Is that it?

3 MS. PETERS: Can the Register, on the
4 basis of what has been given do a substitution that we
5 would then recommend to the Librarian?

6 MR. STEWART: Yes.

7 MS. PETERS: Okay.

8 MR. CASSLER: I just wanted to say that
9 several of the issues donot go to record citation.
10 They go to what did the Panel truly intend and we're
11 having difficulty effectuating their intent because we
12 can't read their minds based on what they wrote.

13 MR. STEWART: I wanted to say on behalf of
14 NAB that it's our view that what needs to be done
15 under 802 by the Librarian is circumscribed by issues
16 that were raised by the parties and further that the
17 parties have the burden on those issues, but if
18 somebody files a petition, challenging a particular
19 aspect of the decision and doesn't provide the
20 Librarian with sufficient record support for adopting
21 an alternative conclusion, then that means that the
22 party hasn't carried its burden and that exhausts the

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1 Librarian's jurisdiction or authority at that point.

2 Do you have a different view on that?

3 MR. ROBERTS: I think our view of our
4 burden up to this point is to identify the issues that
5 we feel are arbitrary and/or contrary to the Copyright
6 Act and the statute does say to make our own
7 determination. The fact that whether someone in their
8 petition to modify or did or did not identify
9 sufficiently citations to the record that will help us
10 or make their own proposals is to, as you're well
11 aware, in reading the petition, no one for the most
12 part -- for the most part, not completely -- is
13 saying the decision, our award needs to be adjusted by
14 point such and such percent or whatever the percentage
15 is based on this particular analysis. Mostly the
16 petitions are just identifying where the Panel went
17 wrong.

18 So I don't think that the fact that
19 someone didn't in their petition identify specifically
20 how their award is supposed to work out necessarily
21 precludes then or doesn't mean that the issue isn't
22 arbitrary and can be let go.

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1 MR. CASSLER: I also want to add that the
2 regulations that provide for the parties to petition
3 to modify are strictly administrative, but those
4 regulations have not been passed. The Librarian would
5 have had to read the whole decision and make up his
6 own mind about things and the fact that they are
7 passed, I don't think tells him he still can't do
8 that. Those are administrative regulations and
9 they're not in the law.

10 MR. STEWART: I'll say that first of all
11 we approached our petition from a different
12 perspective, provided record citations to support the
13 alternative that we requested and we thought that that
14 was the obligation of all of the parties because of
15 what the statute says.

16 Secondly, from our perspective as parties,
17 and I won't speak for other parties, I'll speak for
18 us, having a claim to this fund, for us to have spent
19 a year and very substantial resources in an
20 arbitration proceeding which we raised the claims,
21 defined the claims, presented the evidence and then
22 challenged it in ways that we chose, I for one have

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1 some difficulty with the introduction of additional
2 reasons for reversing or supplanting this process that
3 has taken place over and above what the parties
4 themselves have raised.

5 I have a further question. Have you
6 considered the possibility of looking to the parties
7 rather than a panel or any remand entity to supply you
8 with the record support that you think is necessary to
9 act and decide one way or the other on the decision?

10 MR. ROBERTS: Well, we've considered that,
11 John. We still do have one issue, however, where
12 there was no record taken. And we don't know how to
13 resolve that. I guess it would be fair to identify
14 what that issue is and that issue has to do with Fox
15 programming and whether it's eligible for a
16 distribution of the royalties or not.

17 As everyone knows, in the pre-controversy
18 discovery period, Bob filed a motion for us to decide
19 whether or not Fox programming was eligible. At that
20 time we designated the issue to the Panel because we
21 decided that it could not, was not simply a question
22 of law. It was a mixed question of law and in fact,

1 the Panel then went and decided that it was a question
2 of law.

3 Unfortunately, there is no written order.
4 Had to review the transcripts and they're somewhat
5 cryptic to say the least in what their determination
6 is, except to say their finding as a matter of law
7 that Fox programming is eligible for a royalty
8 distribution.

9 So we were left now, if we had felt that
10 it was a matter of law we would have decided it in the
11 pre-controversy discovery period, but we felt that
12 there had to be facts taken on that. There weren't
13 any.

14 MR. CASSLER: Also, let me also explain
15 what I think John, you didn't hear me when I said that
16 most of our questions have to do with the Panel's
17 intent. We have the record evidence. We know it.
18 It's been cited. We can do it, but to give you an
19 example since we are giving examples here, we have no
20 idea whether the Panel wanted the Devotional claimants
21 to get the same award as they got in 1989. We could
22 go through 12,000 pages and never know. We have to

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1 find out because we don't know and if we don't know,
2 we don't know. That's the difficulty of either
3 adopting what they did or saying we know what they
4 intended. It's not a matter of record evidence.

5 MR. GARRETT: Are there any issues other
6 than the Fox issue in which we contemplate the parties
7 producing additional evidence?

8 MR. ROBERTS: There is one other issue.

9 MR. CASSLER: The other issue had to do
10 with alleged miscategorization of programs which is a
11 predicate to finding out whether the Panel intended
12 that NAB get its Nielsen share. But that's a
13 predicate and we don't know that we have enough record
14 evidence on the issue.

15 MR. STEWART: I'd be happy to address
16 that.

17 (Laughter.)

18 MR. GARRETT: Well, let me -- if you open
19 it up to the issue of miscategorizations of the NAB,
20 will other parties be able to present evidence on
21 miscategorizations as well?

22 MR. CASSLER: We had thought that these

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1 would be as narrow and specific questions as possible,
2 based on the record that was already developed with as
3 little intent to try to create new record as possible
4 because we wanted to keep the scope of the remand
5 limited.

6 One of the things about panel intent, it's
7 always a two-part question. If the Panel wanted a
8 party to get a certain award and it didn't get that
9 award, if it now gets that award, how does the Panel
10 also want it to affect other parties' awards which is
11 another part of their intent that we don't know. But
12 we're trying not to -- those would be the specific
13 questions and the idea would be --

14 MR. GARRETT: That goes to intent. The
15 questions that could, in fact, be answered by a
16 different panel of Arbitrators. You say you have one
17 Arbitrator who certainly told you what his intent was,
18 I suppose. If you now bring in two new Arbitrators,
19 are they going to be in a position to articulate what
20 the intent was of the original Panel?

21 MR. ROBERTS: I don't know whether they'll
22 be able to articulate necessarily what the intent was

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1 of the original Panel, but our biggest problem, our
2 number one problem -- there's other problems -- our
3 number one problem in this decision, Bob, is the lack
4 of adequate explanation.

5 We don't feel that and some of the
6 attorneys that we've consulted with in the Justice
7 Department are not certainly interested in helping us
8 defend a decision that we know cannot withstand
9 scrutiny at the Court of Appeals level and that's why
10 Marybeth said we can't adopt what the Panel has done
11 simply because it's one thing if we could look at what
12 they did and maybe not necessarily agree with it, but
13 as long as they provided some explanation as to what
14 they did, we could live with that, but for the most
15 part although the decision is 170 pages long, there
16 truthfully is 15 pages or less of explanation as to
17 how the Panel went about arriving at the particular
18 numbers that it did. And that is our number one
19 problem and why when in the petitions to modify that
20 the number of arguments that all of you have raised we
21 are not able to determine what was going on with the
22 Panel because there's either no explanation -- most of

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1 the time, no explanation as to the specific arguments
2 or in other circumstances there's inconsistent
3 application of particular approaches where they would
4 announce they were going down one particular path with
5 one of the distribution parties and then not follow
6 through with it or even discuss it for other parties.

7 MS. PETERS: As somebody who was kind of
8 in the process at the beginning and then unfortunately
9 at the end, it seems interesting that the Arbitrators
10 that we have who are usual Arbitrators are not used to
11 doing the kind of thing that this was anticipated,
12 that I did verify with the congressional committees
13 which was act much more like Administrative Law Judges
14 and to really document what they found and how they
15 got where they got to establish a record that could be
16 used by an appellate court to determine whether or not
17 the decision was, in fact, reasonable or was arbitrary
18 or contrary to law and I think that was a struggle
19 that I felt going on a lot and I can tell you that one
20 of the things we're doing is that the contracts that
21 we're going to be using from now on is to put that
22 standard in the contract, that an acceptable product

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1 requires that there be the necessary findings of fact
2 and conclusions of law that are needed in order to
3 provide the appropriate record for an appeals court.

4 MR. ROBERTS: I think in the court of
5 appeals, in taking a decision, if anything with this
6 new system of ad hoc panels, the rationale is going to
7 have to be better explained than the CRT was,
8 certainly not less explained than what the CRT had
9 done in the past and we have a decision that is
10 considerably less than the explanation of certainly
11 the '89 decision as Bob is well aware and it's less
12 explained than some of the other decisions as well and
13 there's likely to be less deference to three ad hoc
14 Arbitrators who have no expertise than the CRT so we
15 were hoping to get a better, even better explained
16 decisions, that we got less on.

17 MS. PETERS: Can we go back to where we
18 started, like who should conduct the proceedings. We
19 were struggling with -- we were thinking about going
20 back to the original if we could get it because they
21 were knowledgeable, they were the ones who had the
22 intent. They wouldn't have a learning curve in the

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1 same way that anyone else would have, be familiar with
2 the evidence. But we really do need to hear from you,
3 what your preferences are, assuming that we all know
4 that you would prefer not to be here and that we all
5 are not facing this issue.

6 MR. STEWART: I would urge once again and
7 raise as a question whether there isn't an alternative
8 to remand?

9 MS. PETERS: In other words, us. I think
10 we came to a conclusion that there were some things we
11 felt we could fix and other things we felt we could
12 not.

13 MR. ROBERTS: We can certainly fix the
14 math. They got the math wrong. That's just a basic
15 matter. But that's not the whole of it.

16 MS. PETERS: So the bottom line is if you
17 can fix some, but not all, you still end up with a
18 remand from the court of appeals.

19 MR. CASSLER: That's what I was going to
20 say. John, how can we do this without ultimately
21 being -- going up to the court of appeals, not feeling
22 very good about what we're defending and then coming

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1 back down and remanding it to an arbitration panel
2 again?

3 MR. STEWART: I mean I guess a difficulty
4 I see is that if you do this any party who doesn't
5 like the results of the next go around will be able to
6 throw us back into starting at Day 1 through a remand
7 from the Court of Appeals or at least will have an
8 argument to that effect and if there's a way we can
9 avoid expending these additional resources and ending
10 up with a zero, of having to start over again, that's
11 -- we have a very strong interest in pursuing those
12 alternatives.

13 MR. ROBERTS: Excuse me, John, but isn't
14 it best to get a decision now that has a legitimate
15 chance of passing the court? I know that no matter
16 what we do or what happens, I'm virtually convinced
17 that someone is going to take an appeal.

18 Isn't it better now to have a decision
19 that at least stands a chance of getting through the
20 court of appeals than one that you know is doomed to
21 failure?

22 MR. STEWART: I disagree with that

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1 assumption, first. And second, I think that what the
2 Court of Appeals is going to be reviewing is the
3 Librarian's decision.

4 MS. PETERS: That's exactly right.

5 MR. STEWART: And that we spent a year
6 putting in the record evidence to support the awards
7 that were made and that we can -- if it's necessary,
8 if you feel that it's necessary, we can provide more
9 assistance in pointing to the record or in defining
10 the issues or whatever. I don't -- so from my
11 perspective, I have a differing assumption going on,
12 but that's my judgment.

13 MR. CASSLER: Cliff Harrington?

14 MR. HARRINGTON: Thank you. I think one
15 of the problems that I have, that the Devotional have
16 as a group, and I can't speak for everyone else, is
17 that to be asked to express our preferences as to how
18 a remand proceeding is rather difficult. We're not
19 sure that you have statutory authority to have a
20 remand proceeding.

21 I certainly wouldn't want to be viewed as
22 having waived my rights to raise that on appeal. I'm

1 kind of in a posture of having -- I'd be in a better
2 position to have it imposed upon me so I can keep an
3 appeal going, rather than to compromise my appeal and
4 go along and help you set up a procedure which I'm not
5 entirely sure you have the authority to do.

6 MS. PETERS: We never expected that people
7 would not raise that in an appellate context. That's
8 a given.

9 MR. CASSLER: One of the difficulties is
10 the mechanism of payment of the Arbitrators because it
11 has been in the past dependent on the legal conduit of
12 you all issuing us a partial settlement agreement so
13 that we could make distribution to you so that you
14 could pay the Arbitrators and so one of the purposes
15 of the meeting was asking you whether that would
16 continue under a remand.

17 MR. GARRETT: Can I just ask about the
18 remand, potential remand, the Fox issue here. Would
19 it be that the parties would have an opportunity to
20 submit new evidence, be given an opportunity to
21 essentially put together, direct a case on the Fox
22 issue, hold evidentiary hearings before a Panel and

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1 then have the opportunity for cross examination to be
2 followed then by rebuttal. Is that the general
3 framework?

4 MR. CASSLER: The first understanding was
5 that you all had an opportunity amend your case by
6 last December 15th on that issue and I think we
7 assumed that you would feel based on what you had
8 submitted last December 15th and that what was lacking
9 is that the Panel rejected your ability to introduce
10 that evidence and certainly it would be subject to
11 cross examination. Rebuttal, we have not thought
12 about, but I think -- I don't want to talk in advance
13 of talking with everybody else, but rebuttal sounds
14 like an important part.

15 MR. GARRETT: And there are going to be
16 proposed findings submitted to the Panel just as we
17 submitted proposed findings on all the other issues in
18 the initial go-around?

19 I guess -- so I don't say it one at a
20 time, after the Panel reaches a decision, will the
21 parties have the opportunity to submit petitions to
22 the Librarian as we did in the past?

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1 MR. CASSLER: We envision that after a
2 remand report gets made to the Librarian that you
3 could have another petition to modify go-around.

4 MR. ROBERTS: Yes, absolutely. It's
5 basically, Bob, the issue to be carried through as we
6 had intended it to be carried through last December
7 and that evidence be taken be presented and that the
8 panel deal with that accordingly. It may come out the
9 same way, that's fine. It may come out differently.
10 And also with some explanation as to why obviously
11 they would be arriving at the decision they reached.

12 MS. PETERS: Dennis?

13 MR. LANE: First of all, I'd like to
14 express my concern about the statutory authority. I
15 don't believe that the Office has the authority.
16 That's evident by a reading of the statute language,
17 but I'm assuming that you can do it anyway, I have a
18 much more basic question.

19 Would this be, whatever it is, is this an
20 additional report of a Panel, reconstituted? Is this
21 a supplemental report? And how does that go up on the
22 Court of Appeals ultimately you still have to issue

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1 the Librarian's report, I understand that. And that
2 technically will be what's appealed, but obviously if
3 there are two Panel reports, there's the Panel report
4 and the supplemental Panel report, it will color the
5 thing. I'd like your views on that.

6 MR. ROBERTS: We were approaching that it
7 would be supplemental because again, as we said we're
8 contemplating identifying very specific issues, and
9 very specific questions for the Panel to respond to
10 and so therefore it would be a supplemental report.
11 In other words, we find a decision lacking with these
12 respects and they would be filling in the blanks.

13 MR. HESTER: Tim Hester for Public
14 Television. It seems to me we obviously confront a
15 situation where not all parties are consenting to
16 this procedure you're proposing and you're really
17 setting all of us and we have to start over again. It
18 seems to me the much better circumstance would be, I
19 think, following up on Mr. Stewart's comment not to
20 accept the premise that this decision is not
21 sustainable on appeal.

22 It seems to me that the Copyright Office

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1 and the Librarian could undertake to issue this
2 supplemental report you're talking about and issue the
3 supplemental report in the period contemplated under
4 the statute.

5 The parties have submitted very extensive
6 evidentiary findings, conclusions of law. We worked
7 very hard on that and there's an awful lot of material
8 there for you to write on whatever issue you think is
9 left unaddressed.

10 And it seems to me that rather than
11 imposing a procedure that's not going to secure the
12 consent of all parties, you would work within the
13 statute and it would seem to me that you have the
14 capability of issuing a supplemental report within the
15 time period.

16 MR. ROBERTS: Can I ask you, Tim, how you
17 -- you mentioned the Fox issue, when there's no
18 evidence in the record to consider. How would you
19 resolve that issue?

20 MR. HESTER: If you note the petition --

21 MR. ROBERTS: Except otherwise say, we'll
22 just accept the Panel, what the Panel did because we

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1 have no choice.

2 MR. LANE: Bill, I think you're wrong. I
3 think the evidence is technically in the record. It
4 just was not considered by the Panel in making its
5 decision. It was filed by both of us and so
6 technically it is in the record, but I think the
7 supposition that it's not in the record is wrong.

8 MR. GARRETT: I don't want to let that go

9 --

10 (Laughter.)

11 MR. GARRETT: It's definitely the case
12 with us. But the reality is that the written
13 statements of the parties are in the record and we
14 have not had an opportunity to cross examine Preston
15 Padden, nor have we had the opportunity to present
16 rebuttal testimony and again my friend Preston Padden
17 might have to say, but that's just my position.

18 MR. HESTER: I would say if you read the
19 petition to modify the Fox issue, it's a legal
20 argument, it's not a factual argument. There's not
21 much factual dispute and I actually think one of the
22 things you ought to consider is whether through the

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1 evolution of the issue the proceeding, it really was
2 entirely appropriate for the Panel to do as it did
3 because there wasn't a big factual question.

4 At an early stage in the case, in
5 discovery motions, I can certainly understand why it
6 seemed fairly premature to rule on a broad claim, but
7 the question is not posed to you as a factual one.
8 And I would submit that it can be decided. That would
9 be my answer as to how that can be accommodated and I
10 think that's exactly what the Panel took into account
11 at that stage in the process. They heard a lot about
12 the structure of Fox and other programming by the time
13 they issued that ruling. It was after almost a full
14 month of hearings and yes, they had not taken the
15 specific evidence. They had not heard those specific
16 parties, but they have received the written
17 evidentiary submissions and there wasn't. If you go
18 back and look at those written evidentiary submissions
19 on the Fox issue, that's not where the fight lies.

20 MR. ROBERTS: So far what I've heard is
21 mostly negative comment about -- not mostly, all
22 negative comment about the possibility of a remand and

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1 Marybeth, with your permission, I would like to take
2 a break, get an opportunity for us to talk and the
3 parties to talk as well because if all of you now
4 hearing one another talk for a while, against this,
5 when we reconvene --

6 MS. PETERS: We can go back to what we
7 were going to do. From the very beginning, we were
8 going to point out all the areas that we thought were
9 arbitrary and capricious and collect what we could,
10 but we felt we couldn't correct everything. So
11 there's a remand no matter what.

12 That's how I saw it. Do you want to
13 change that? That's still a possibility. It's when
14 we told that to everybody, people felt that in good
15 conscience, we should not do that. I'm talking about
16 people who would have to defend this.

17 MR. GOTTFRIED: Is there any possibility
18 of issuing such a proceeding -- any consent --

19 MR. CASSLER: What kind of decision --

20 MS. PETERS: Then decide whether they like
21 it or not.

22 MR. ROBERTS: No.

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1. MR. CAMPANELLI: See whether there are
2 open issues.

3 MR. STEWART: It does seem to me that --
4 we didn't take a position on the Fox issue, but if
5 your view is that the decision of the Panel must be
6 reversed, then that ought to be a part of the
7 Librarian's decision and if you don't have enough
8 record based on that to substitute something for it,
9 then I think that ought to be part of your decision
10 and that ought to be subject to the Court of Appeals
11 and whether you remand at that time or do whatever.
12 That, to me, it's important for a variety of reasons
13 to stay on the path and to follow the procedure that
14 was set out.

15 MR. IVINS: I understand your concern
16 about, you genuinely feel that it's going to -- left
17 the way it is it's going to be remanded anyway because
18 it's so inadequate, but I think the concern that we're
19 expressing is getting up to the Court of Appeals is
20 what you feel is good, strong decision that otherwise
21 would not be reversible, but basically having it
22 remanded anyway because you remanded it and I

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1 understand and obviously in this room there are some
2 strong sentiments that you don't have the authority to
3 remand and you may not wish to discuss your thoughts
4 on why you think you have that power, but kind of as
5 the paying part of this entity, I think there's a real
6 concern that we will go through what sounds like
7 although you were obviously going to try to limit it
8 as much as possible, a fairly extensive and expensive
9 remand procedure at this stage and then get to the
10 Court of Appeals and let them say, no, no, you don't
11 have the authority to do that, so we're remanding it
12 on that basis and we don't even get to the merits of
13 the great decision that resulted because of the
14 initial evidence you adduced from your remand period.

15 MS. PETERS: Right.

16 MR. GARRETT: Just to make a general
17 comment, at the outset of this process, the objective
18 was to get three individuals, three Arbitrators to
19 give us their best judgment on how this fund ought to
20 be allocated and we went to three people and you went
21 to three people who were impartial and no connection
22 with any of the parties in this proceeding who were

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1 going to approach it in a fair and open mind.

2 All of the parties in this room here have
3 spent a great deal of time, effort, expense in order
4 to get the best judgment of these three individuals.
5 We did that over a course of some months where we
6 lived in this room, when we weren't in this room we
7 were out preparing for the next day's witnesses and
8 the final testimony. There was a great deal of effort
9 that went into getting the judgment from these three
10 Arbitrators.

11 What concerns me, not only for this
12 proceeding, but for future proceedings, is the notion
13 that that might mean nothing that process might mean
14 nothing. All the time and effort and expense that
15 went into getting that particular judgment from these
16 two arbitrators really has no effect. I am concerned
17 about the notion of having to start over again,
18 whether that is because of a remand from you or there'
19 sa remand from the Court of Appeals.

20 There are some very different approaches
21 that were taken from the parties in this room in terms
22 of what would be appropriate issues if we decide to

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1 appeal. Some, I think, might put us in the category
2 there are some narrow issues that we would look at
3 more closely. There are others that would say in
4 essence that the whole process is up for grabs and
5 should we do it.

6 If it's the latter approach and this whole
7 notion of remand is bringing us closer as the approach
8 to be doing, then I have very grave concerns.

9 MS. PETERS: I would agree with you and
10 I'll just put it out now, but it's not where I am.
11 Looking at this, I wasn't that involved, but looking
12 at it as the head of the Office that has to deal with
13 this and that has to do with the Librarian, and having
14 talked to the congressional committees, I wonder why
15 we're in the position that we're in, why you wouldn't
16 have a decision that went right to the Court of
17 Appeals.

18 That's something I'd like to look at when
19 all of this is over, because I think we find ourselves
20 in an almost impossible situation at this point. And
21 there just doesn't seem to be any good way out that
22 makes everybody feel happy or that feels what's being

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1 done is good or right.

2 I agree, you paid an awful lot of money
3 and you found a lot of problems and so it's not the
4 best solution at all.

5 MR. CASSLER: I just want to add that
6 we're not trying to reopen things at all or make this
7 into a reconsideration. The idea is that it's a
8 remand of specific questions probing what the Panel
9 really wanted to do and on some of the issues they
10 could do it rather quickly. In fact, almost we felt
11 like we could almost call them up and find out what
12 did you intend, we could do this rather quickly, but
13 other things might be a little longer. It's not
14 intended to be a reconsideration, the second part of
15 the apple.

16 We're trying to avoid that.

17 MS. PETERS: Can I just ask you a question
18 which is if we listen and we say okay, you do the best
19 that you can and go and deal with the Court of Appeals
20 and maybe a remand, on the authority question, do you
21 think we have authority to evidence and to get it on
22 the issue that you say that is sort of there, but

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1 never afforded the opportunities for the process with
2 respect to that issue?

3 MR. MIDLEN: I don't think there's
4 anything in the statute that would preclude you from
5 doing that.

6 MS. PETERS: August 2.

7 MR. GARRETT: I -- this is the issue
8 before the Fox issue, I certainly would have an
9 interest in it. I am sort of troubled by the notion
10 of the Librarian and Register's Office conducting
11 evidentiary hearings. I don't think that was
12 contemplated.

13 MS. PETERS: I agree, nor was a remand.
14 They're very similar. What do you do with a situation
15 you're now finding yourself in?

16 MR. CASSLER: Let's adjourn.

17 MS. PETERS: Why don't we, the three of
18 us, what do you think? Five after. We're going to
19 come back at 5 after 12 and --

20 MR. GARRETT: Does that mean we have to be
21 back at 5 after 12?

22 (Laughter.)

1 (Off the record.)

2 MS. PETERS: All right, having listened to
3 everything you said and having quickly decided did we
4 have any alternative options, I'll tell you what we
5 think or what we would like to do as we're going to
6 propose it to you.

7 I think you heard from us that one of the
8 biggest difficulties from us was what was the intent
9 of the Arbitrators, how do you figure out where they
10 got to where they got? And we also recognized that as
11 we certainly did that no matter how brilliant you
12 ended up with an award, it still might well be
13 remanded again.

14 So where we are right now is that what we
15 would like to do is to take the questions that we
16 have, with things that we think are arbitrary, make
17 them very specific and to basically send those
18 questions to the three Arbitrators, have them answer
19 those questions under a contract with us which would,
20 the answers would be supplemented to the decision that
21 we have and help us basically try to resolve the
22 difficulties that we have.

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1 We would do a contract and pay for it out
2 of the operating expenses that have already been
3 allocated to the CARP fund and then put a -- after
4 talking to them, a specific date, to get the response
5 back.

6 And then we would resolve and make our
7 recommendation to the Librarian which you know already
8 is -- it will be different than what you have.
9 Because we've already found that it has problems and
10 therefore most likely, I can't say most likely, it
11 will lead to different awards and that decision would
12 be the one that would go to the Curt of Appeals.

13 This obviously means that we do not make
14 the August 2nd deadline. There is no way in the world
15 to do that. We would have to work on getting the
16 questions ready. We will have to get a contract. We
17 will have to contact the Arbitrators after giving them
18 a reasonable period of time to answer those questions.
19 We'll have to get them back and then we will have to
20 do our substitute opinion so it's probably some time
21 in the fall when the decision of the Librarian would
22 be published.

1 So that's our proposal and you can tell us
2 what you've come up with, but that we should at least
3 put out on the table what we thought we could do to
4 respond to what the concerns were that you had
5 identified.

6 MR. HESTER: Could I propose an
7 alternative and maybe react quickly?

8 MS. PETERS: Sure.

9 MR. HESTER: I think I can -- I speak on
10 behalf of a number of parties and NAB, Joint Sports,
11 Devotional, Canadians, I believe, in saying that we
12 are concerned about a process that does not adhere to
13 a statutory deadline and our proposal would be that in
14 the first instance you issue a list of the questions
15 and issues that you perceived in the decision of the
16 parties, issue that let's say by Monday or Tuesday and
17 an opportunity for the parties to provide comments and
18 briefing by the end of the week perhaps. These days
19 are not fixed in stone, but the concept would be to
20 undertake to develop the issues and the
21 supplementation that would make this decision
22 defensible, that would address the aspects of the

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1 decision that's written that you consider now
2 deficient, with the objective of doing that, within
3 the statutory time period, so that there's an
4 opportunity to refer to the statutory deadline. It
5 seems to me that the proposal you've laid out, in
6 fact, if you really come to the view that the comments
7 of the parties and briefing from the parties and the
8 pre-existing proposed findings are inadequate to allow
9 you to address the deficiencies you've identified, I
10 would suppose the proposal you have suggested would be
11 a fallback in any event since I gather you contemplate
12 you would not try to adhere to the deadline.

13 MS. PETERS: We see it as an impossible
14 deadline.

15 What we identified was the fact that we
16 thought there were significant places where we had no
17 idea what the intent of the parties were or how they
18 got to the decision that they got to and even with
19 what you're saying it seems that that piece would
20 still be missing, but I'm going to let people who are
21 closer to this respond.

22 MR. ROBERTS: Well, Tim, we've heard from

1 all of you once with petitions and replies and I would
2 assume that at least for the most part all the parties
3 have identified the areas that they feel are arbitrary
4 action. That's certainly the way I read the petitions
5 to come out. In terms of the areas that we feel are
6 -- is legitimately arbitrary, seems to me that right
7 now, I guess that's between -- if we go with this
8 proposal, that would be between us and the
9 Arbitrators. I would be reluctant to be coming up
10 with a list of issues and questions that we would
11 present to the Arbitrators and then be circulating
12 them to the parties, essentially for their approval or
13 disapproval since we've already heard where you feel
14 that the decision was wrong.

15 MR. HESTER: But you're in a circumstance
16 with all due respect none of you has a basis, really,
17 for identifying all the places in the record where
18 answers may lie. And those who went through the
19 process have the ability to point you to places in the
20 record that may well address questions you would have.
21 One of the things that's inherent in the decision of
22 the panel is that they sat through the case too. They

1 have decided with an extensive background of hearing
2 all this evidence. None of you did. And we would
3 like the opportunity to have a decision within this
4 statutory deadline and a decision that addresses
5 whatever gaps you see. If you follow this alternative
6 approach you don't give us a chance to address
7 deficiencies and make sure there's a decision within
8 the time deadlines and my concern is that you -- you
9 run the risk here of having to start over.

10 MR. ROBERTS: Well, I certainly agree that
11 obviously we were not there and it is extremely
12 difficult to identify because we were not there and
13 we're coming into the process in the eleventh hour to
14 looking at a tremendously large record in a very short
15 period of time and then be expected to provide the
16 answers. However, I'm not so sure that I agree with
17 you that perhaps the answers do lie in the transcript.
18 It seems to me the problem with the Panel's decision
19 in talking with Mr. Jiganti is not so much that they
20 perhaps necessarily ignored issues. I have a feeling
21 that they talked things out thoroughly amongst
22 themselves in their conferences and he indicated, told

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1 me that that's exactly what they did. The problem is
2 that after they came to a resolution they chose not to
3 offer any explanation in any circumstances as to why
4 they did reach that conclusion.

5 If that's essentially what we're looking
6 for and asking all of you to be able to step forward
7 and identify places in the record where once we've
8 come up with a question that you think your evidence
9 or someone else's evidence is particularly relevant or
10 addresses the issue, they've already gone through that
11 balance.

12 MR. ROBERTS: But if there's conflicting
13 evidence on the point it's not arbitrary for them to
14 have decided one way or the other.

15 MR. HESTER: That is correct.

16 MS. PETERS: Correct.

17 MR. ROBERTS: We agree with that one
18 hundred percent and that's why we certainly are not
19 sending everyone's arguments along because we have
20 determined that a lot of them, although the parties
21 obviously submitting them says that it was arbitrary
22 action by the panel because it didn't go our way

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1 although a lot of the questions do go to the weight of
2 the evidence and those are not the ones that we're
3 interested in revisiting.

4 MR. HARRINGTON: Yes, with all due
5 respect, I would suggest, first, I think someone
6 earlier described the job that needed to be done to be
7 more like a decision of an Administrative Law Judge
8 rather than a Judge in the courts.

9 MS. PETERS: I did that.

10 MR. HARRINGTON: Well, I think that's
11 right, but I would say that if you look at the
12 standards normally applied in reviewing what an
13 Administrative Law Judge comes out with, a reviewing
14 agency, if they do find an arbitrary decision made by
15 the Judge, they don't necessarily remand the decision.
16 They look at the record and make their own judgment,
17 as long as their own judgment is sound and supported
18 by the record. That will be upheld on appeal and I
19 would suggest that rather than necessarily having
20 every time you don't know what the intent of the Panel
21 was, or what's behind a decision that they stayed, if
22 you find the decision to be arbitrary, make your own

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1 decision.

2 MR. ROBERTS: Well, I appreciate your
3 trust in us, but I know that you've had a long
4 practice before the Federal Communications Commission
5 and if we were the Review Board sitting here today
6 looking over an ALJ's decision, I would be shocked if
7 the Review Board would undertake to do such a
8 substantial rewriting of an ALJ's decision and not
9 simply remand it back for further explanation.

10 MR. STEWART: I would hope you don't take
11 the Review Board as your --

12 (Laughter.)

13 MR. IVINS: Former Reviewer --

14 MR. STEWART: I want to suggest two
15 points. One is that -- I have a concern which I guess
16 is this alternative to remand presents the same kinds
17 of risks of corrupting the process that will end up in
18 the same place we are concerned with in remand.

19 I have some concern with ex parte rules.
20 If you're proposing to have communications with the
21 Panel without allowing the parties to see those
22 comments, see the points that you raise and identify

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1 them to comment on them --

2 MS. PETERS: No, no, no. We were going to
3 questions --

4 MR. CASSLER: The questions.

5 MS. PETERS: And you would have questions
6 too.

7 MR. STEWART: I'm sorry.

8 MS. PETERS: It will all be paper. They
9 will get questions and we will get answers on paper.
10 No, we're not going to be talking.

11 MR. STEWART: The last comment I want to
12 make is general. I for me and I think others were very
13 frustrated back in 1993 to have the Congress take the
14 CRT as its own issue without consulting with the
15 parties at all, the only parties whose interest is
16 affected by this.

17 I don't suggest that that is what you're
18 doing here, but it strikes me that there's sort of a
19 fundamental difference in perspective. From our
20 perspective in this litigation, if a party didn't put
21 in, didn't take the opportunity to put in evidence to
22 support his case before the record was closed, that's

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1 it. The party loses. And when the standard of review
2 that Cliff referred to is also one in which the
3 reviewers needn't struggle with the question of
4 whether the entire decision is right or not, nor even
5 do a very substantial, undertake very substantial
6 efforts to go back and review all of the original
7 records, because the issues that -- from my
8 perspective, that you need to resolve are only the
9 ones that the parties raised and only on the basis
10 that the parties raised to you.

11 If you believe that a party has not
12 adequately supported an argument that the Panel's
13 decision should be reversed, modified with respect to
14 that issue, then you simply should say you didn't
15 sustain the burden and rewrite the decision based on
16 that issue.

17 It's not an independent reason for you,
18 because the only ultimate issue here is what shares of
19 the funds the parties get. It's not that you need to
20 refine the decision in a way that makes it more
21 defensible from an independent perspective. It's just
22 that the parties through the case have they presented

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1 sufficient support for changing it. That's what I
2 would like to see you do and that's why Tim's idea, if
3 in fact, you've looked at the petitions and you don't
4 think you have enough for your -- in support of your
5 effort, I'd be happy to provide additional record
6 citations or copies of the record or whatever it takes
7 to give you whatever you need. And if you decide that
8 that's not enough, then from my perspective you just
9 say you haven't proved your case and we're not going
10 to accept your petition.

11 MR. GARRETT: Let me just state that I
12 don't believe that you're remanding this -- any issues
13 to the Panel necessarily to create the error. I
14 certainly don't believe that it necessarily creates
15 reversible error. Having said that, I would like to
16 if at all possible avoid the necessary delays and
17 expenses that come with remand, if there's any way to
18 do that.

19 And it's for that reason that I would
20 favor the proposal as set forth by Tim. As I
21 understand it, you are going to put together a list of
22 issues that you would like the Panel to address. All

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1 that Tim is proposing is that you make that list
2 public, get our comments back out and we would
3 endeavor to give you those comments as quickly as
4 possible to determine whether there is any way those
5 issues can be resolved without necessity or remand.

6 You may read our comments and decide that
7 there is no way. You've got to get the comments.
8 You've got to get the input from the Panel and if
9 that's your judgment, that's obviously what's going to
10 happen here.

11 But all we're saying is give us an
12 opportunity to tell you whether there is in our view
13 any way of avoiding this remand which is down the road
14 going to be used by whoever is disappointed as a way
15 of setting this whole thing back and we'll be in this
16 room three years from now still dealing with 1990,
17 1991 and 1992.

18 We want to avoid that. You have nothing
19 to lose under this process in the time it takes to get
20 our thoughts and then make a judgment of whether or
21 not there is any value to it.

22 MS. PETERS: We can talk amongst ourselves

1 and get back to you on how to go about it. I think we
2 do need to talk about it. I'll just say from my own,
3 I don't see any way to meet the deadline in all
4 honesty.

5 If we put the questions together and we go
6 to you and they come back, the ability to clear that
7 from the Register's Office and then get it to the
8 Librarian's office becomes almost impossible and the
9 question is how late? Our goal is to do it as quickly
10 as possible.

11 MR. CASSLER: If I can just say one thing.
12 I think there are two things I keep hearing. One is
13 that you fear this is going to be a reconsideration.
14 And that that would taint the original proceeding and
15 we are trying, our entire intent is to structure this
16 not as a reconsideration, but a probing of the
17 original document to find out what was the Panel's
18 intent or explanations for something they just left
19 unexplained so that we can deal on what you've already
20 given us and not in any way to open this up for
21 reconsideration which I think would be the only reason
22 why it would taint the proceeding.

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1 The other is that we've got all your
2 record evidence citations and we know where they are
3 and we've looked at them and we still have these
4 problems because the problems are not does the record
5 support the way the Panel did. The question is what
6 did the Panel do and we don't know what the Panel did.

7 MR. GARRETT: On the statutory deadline,
8 I know there's certainly precedent in this area where
9 an Agency has gone beyond a statutory deadline that
10 would happen in the course of the original proceeding.
11 If you came in and issued an appeal in the D.C.
12 Circuit, it would not consider tribunals going past
13 that deadline, a reversal error in any way.

14 I am not as concerned about your coming
15 out with a decision on August 1. My concern is about
16 having to be back here three years from now or two
17 years from now, whatever it is, and going through this
18 whole process again.

19 I'm also concerned that if we can keep the
20 decision making here as close to August 1 as possible,
21 and again, you may be right in saying that you have to
22 send it back on remand here and anything we have to

1 say about these issues is of no value. All we're
2 asking is we be given the opportunity to tell you yes,
3 there may be a way of your doing this without going to
4 remand.

5 It may be that we will get these issues,
6 we don't have a consensus on that or it may be that
7 the issues get narrower. I don't know. But it strikes
8 me that if we can do this in a fairly timely way,
9 there's nothing to be lost by that.

10 MS. PETERS: Believe me, we would like to
11 put this behind us too as quickly as possible. We're
12 really looking for a way to get ourselves out of what
13 is a very difficult issue for us in the best possible
14 way to do it. We believe that the system should be
15 efficient, orderly and to the extent that the way the
16 law is drafted is an impediment, we hope to seek
17 changes to that because we don't want a system that
18 doesn't work for the parties.

19 So we would actually like when this is
20 done, we need to work with all of you on what does it
21 take to make the system work more efficiently and
22 better.

1 Did you want to add anything?

2 MR. ROBERTS: No.

3 MS. PETERS: Does anybody else want to add
4 anything at this point?

5 I guess what we would like to do is talk
6 amongst ourselves and basically let you know where we
7 are and how we plan to go about it. We'll do that as
8 soon as possible.

9 MR. STEWART: I'd like to -- what I heard
10 Tim say is that all parties, except MPAA have
11 addressed support for this alternative that he's
12 proposed and I would ask that if Dennis has a position
13 on that proposal to let us know, say whether you
14 support this alternative of having the issues
15 identified for us and having us comment on whether
16 they should be remanded or not.

17 MR. LANE: I would say that first of all
18 to digress, I don't see how you can say this is not
19 reconsideration. You're saying we don't have an
20 explanation and we're going to ask the Panel to give
21 us a better explanation, so I don't see how you can
22 argue that as a reconsideration, if that's what it is.

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1 It's rewriting an opinion.

2 If there's a better way to do that, I
3 don't know that that's a better way to do it.
4 Certainly it gives us a chance to write more briefs on
5 this issue and maybe resolve some things, but I'm
6 hearing that that isn't what's really needed here. So
7 my concern is that is that we can do a lot of work, as
8 we've done a lot of work and I think we don't want to
9 be in the same place we are three years from now. I'm
10 not sure how much that helps the process.

11 MS. PETERS: Okay. Thank you very much.

12 (Whereupon, at 12:34 p.m., the meeting was
13 concluded.)

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CERTIFICATE

This is to certify that the foregoing transcript in
the matter of: Meeting: Distribution of 1990, 1991
and 1992 Cable Royalty Funds

Before: Library of Congress
Copyright Arbitration Royalty Panel

Date: July 11, 1996

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.

Charles F. Ryan